Supreme Court, U.S.
FILED
OCT 10 1995

No. 95-577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF SANTA ANA,
DAVID REAM and ROBERT RICHARD,
Petitioners,
vs.
BARBARA LAMBERT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

1. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER LAMBERT WAS REPRIMANDED FOR THE PARTS OF HER SPEECH THAT WERE PROTECTED BY THE FIRST AMENDMENT?

2. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN EMPLOYEE'S SPEECH, IN ORDER TO CONSTITUTE SPEECH UPON A MATTER OF PUBLIC CONCERN MUST ADDRESS ONE OF THE FOLLOWING: 1) SPEECH MUST BE OF PUBLIC IMPORT IN EVALUATING A PUBLIC OFFICIAL; 2) SPEECH INDICATING A PUBLIC OFFICE WAS NOT DISCHARGING ITS GOVERNMENTAL DUTIES; 3) SPEECH THAT BRINGS TO LIGHT ACTUAL OR POTENTIAL WRONGDOING ON THE PART OF GOVERNMENTAL OFFICIALS?

3. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SPEECH UPON THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY CONSTITUTES INHERENT MATTERS OF PUBLIC CONCERN?

4. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A FULL *CONNICK* ANALYSIS OF THE CONTENT, FORM AND CONTEXT IS NECESSARY WHEN THE SPEECH INVOLVED IS NOT UPON INHERENT MATTERS OF PUBLIC CONCERN, BUT CONCERNS ONLY THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners, City of Santa Ana, David Ream, City Manager, (hereinafter "Ream"), and Robert Richard, Director of the Santa Ana Public Library, (hereinafter "Richard").

The Respondents are Barbara Lambert, (hereinafter "Lambert"), and the Santa Ana City Employees Association (hereinafter, "SACEA"). Lambert is an employee in the City's library.

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PETITION FOR WRIT OF CERTIORARI

The City of Santa Ana, David Ream, and Robert Richard respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The Ninth Circuit Court of Appeals published opinion is cited at 59 F.3d 134 (9th Cir. 1995) and is reproduced herein as Appendix A. The district court order of November 24, 1992, granting motion by plaintiffs for summary judgment and granting in part and denying in part motion by defendants for partial summary judgment is reproduced herein as Appendix B. The district court order of July 26, 1993, granting motion by plaintiff for summary judgment on defendants' claims of qualified immunity is reproduced herein as Appendix C. The judgment on special verdict of August 23, 1993, of the district court is reproduced herein as Appendix D. The pertinent constitutional provisions, the First Amendment, the Fourteenth Amendment, as well as the statute involved, 42 U.S.C. § 1983 are reproduced in Appendix E. The text of the speech by Barbara Lambert given to the City Council on October 15, 1990, is reproduced herein as Appendix F. The written reprimand by Library Director Robert Richard dated November 2, 1990, is reproduced herein is Appendix G.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1254 and United States Supreme Court Rule 10.1(a) and (c), this Court has jurisdiction to consider this petition for writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit. The Ninth Circuit entered judgment on July 10, 1995 [Appendix A].

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and the Fourteenth Amendments to the United States Constitution are reproduced herein as Appendix E-1. 42 U.S.C. § 1983 is reproduced herein as Appendix E-2.

STATEMENT OF THE CASE

This case involved the First Amendment claims of Lambert and the SACEA, as well as qualified immunity issues as to Ream and Richard. The only issue now raised before this Court is the First Amendment issue: Were the First Amendment rights of Lambert violated by the written reprimand issued by Richard?

1. Important Legal Issues

This case presents several issues in which the Court should issue a writ of certiorari.

First, there is an important legal issue of whether the Ninth Circuit was correct in holding that the *entire* speech was protected. Under *Waters v. Churchill*, __ U.S. __ (1994), 114 S.Ct. 1878, an employee who makes

an unprotected statement may be disciplined even though the nonprotected statement is surrounded by protected statements. Petitioners argue that the Ninth Circuit either did not apply *Waters* at all, or at best, incorrectly, as the majority of Lambert's statement constituted a personal attack on a public official, which is not protected speech.

Second, there is an important legal issue concerning the definition of public concern in relation to a public employee speech. The Fourth Circuit has strictly held that in order for a public employee's speech upon matters of public concern to be protected, the speech must be of public import in evaluation a public official, indicate that a public officer was not discharging its governmental duties or reveal actual or potential wrongdoing cconcerning a govertnmental officials. The Seventh Circuit has held similarly, as have other Circuits. The speech made by Lambert concerned none of these; nothing was said regarding Richard's qualifications for his post, nor was any wrongdoing alleged. The speech was nothing more than a personal diatribe against Richard.

Third, there is an important legal issue concerning speech regarding the internal workings of a governmental agency — does this speech constitute matters of inherent public concern? According to *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), a federal court is not the appropriate place to review employment decisions made when a public employee speaks upon matters of personal interest only.

Fourth, there is an important legal issue as to whether a full *Connick* analysis as to form and context is necessary when the content of a speech is *not* upon inherent matters of public concern. The Ninth Circuit decision included no analysis of the content, form and context of plaintiff's speech and assumed because the speech

concerned a "visible" public agency, it was a matter of public concern. The Ninth Circuit cited *Connick*, but did not use it in its analysis. Cases from other circuits indicate that if an employee's speech is not upon an inherent matter, of public concern, a full *Connick* analysis is necessary to ascertain the form and context of the speech. Content of a speech that may tangentially touch on a public concern, may not actually do so, once the form and context are considered.

2. Procedural History

Lambert and the SACEA initially brought an action against Petitioners as a result of a written reprimand received from Library Director Richard as a result of reading a prepared statement before the Santa Ana City Council, which criticized Richard's management practices. When Richard, and finally Ream refused to withdraw the reprimand from plaintiff's personnel file, Lambert and the SACEA initiated the underlying action in the United States District Court for the Central District of California.

Respondents sought declaratory relief and damages for the alleged violation of Lambert's First and Fourteenth Amendment rights. The district court granted Respondents' motion for summary judgment on the issue of liability, with a finding that all named petitioners violated Lambert's First Amendment Rights. There was also a holding that respondents were also entitled to declaratory and injunctive relief, and the district court also granted respondent's motion for summary judgment denying qualified immunity to the individual Petitioners.

Petitioners appealed to the Ninth Circuit on the First Amendment and qualified immunity issues, the Ninth Circuit upheld the decision of the district court.

REASONS WHY THE WRIT SHOULD ISSUE

I.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER LAMBERT WAS REPRIMANDED FOR THE PARTS OF HER SPEECH THAT WERE PROTECTED BY THE FIRST AMENDMENT?

In Petitioner's reply brief to the Ninth Circuit, petitioner cited *Waters v. Churchill*, __ U.S. __, 128 L.Ed.2d 686, 114 S.Ct.1878, 1891 (1994), for the proposition that as long as Lambert was disciplined only for the part of her speech that was not upon a matter of public concern, there was no violation of Lambert's First Amendment rights:

> "So long as Davis and Waters discharged Churchill only for part of the speech that was either not upon an issue of public concern . . . it is irrelevant whether the rest of the speech was unbeknownst to them, both on a matter of public concern and non-disruptive. An employee who makes an unprotected statement is not immunized by discipline by the fact that this statement is surounded by protected statements."

The text of Lambert's speech to the Santa Ana City Council on October 15, 1990, is found at Appendix F. What is of extreme importance concerning the above-cited passage is that Library Director Richard reprimanded Lambert for the private nature of the speech attacked him personally; that is, for the strictly private nature of her speech.

In Richard's reprimand, he stated the following, found at Appendix G.

> "At the City Council evening session on Monday, October 15, 1990, you came and spoke before the Santa Ana City Council. Without any facts to support your remarks, you made comments to the Council such as 'our indictment of Rob Richard . . .' and 'His wrongful conduct is more insidious . . .; These statements constitute insubodinate behavior toward the Director of the Santa Ana Public Library."

Lambert argued below that her speech addressed two matters of public concern: (1) low morale of the library department due to the management methods of Richard; and (2) the City's administration had alledgedly suppressed the public disclosure of a study of ". . . library staff members' attitudes toward, and opinions of Richard." However, concerning the present discussion, if, assuming arguendo, these statements touched upon a matter of public concern, *Richard did not punish Lambert for these aspects of her speech.* Instead, she was reprimanded for the personal, nonpublic nature of her speech, in which she castigated Richard's character. *Waters* permitted Richard to do this, and the fact he actually did so, under the *Waters* holding, did not violate the First Amendment rights of Lambert.

The Ninth Circuit basically ignored *Waters* and concluded that Lambert was reprimanded for the *entire* statement before the City Council. (See footnote two of the Ninth Circuit's opinion.) This exceeded the bounds of any rational conclusion. It must be kept in mind that two-thirds of the reprimand dealt with personal criticisms of Richard and his style of management. The reprimand then concludes with the statement that "these

statements constitute insubordinate behavior toward the Director of the Santa Ana Public Library." The examples cited by Richard in his reprimand letter are personal in nature, directed toward him. If one was to assume the reprimand went beyond the remarks cited, the only conclusion that could logically be made from the text of Richard's reprimand memorandum was that he was punishing her for the personal, unprotected statements, which constituted, in his opinion, insubordination.

A. Personal attacks against a public official are not protected by the First Amendment as speech upon an issue of public concern.

Once more, assuming arguendo that: (1) low morale of the library department due to the management methods of Richard; and (2) the City's administration had alledgedly suppressed the public disclosure of a study of ". . . library staff members' attitudes toward, and opinions of Richard" *were* issues of public concern, the protection of the First Amendment does not include personal attacks made against a public official of a public institution.

In the case of *Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994), plaintiff, an administrative assistant for a fire protection district, had been suspended for two days because he refused to remove an American flag patch from his uniform during the Gulf War. After his suspension, plaintiff attended a public board meeting, wherein the issue of his suspension was raised. After plaintiff's supervisor recited his version, plaintiff stood up and called his supervisor a liar. Plaintiff was terminated on the grounds of insubordination.

The court found plaintiff's "speech" concerning the wearing of the flag was on a matter of public concern, but his rights were not violated by his termination for insubordination. The court stated:

> "When a person does initially engage in protected . . . speech on matters of a public concern, [he] may not use this protection . . . to also level personal attacks on . . . officials . . . of a public institution" *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1383 (8th Cir.), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 100 (1989) ". . . When what started out as protected debate turns into 'caustic personal attacks' against colleagues in a public service workplace, the speech is no longer deemed relevant to 'a matter of public concern,' *id.* at 1382, and is not protected under *Connick*."

The personal drift of Lambert's expression against Rob Richard is apparent in the first few lines of her speech. Lambert's expression opens with "THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP."

Lambert then commences her personal attack: In the fourth line, she states ". . . is the essence of our indictment of Rob Richard . . ." and thus sets the tone for the speech. Further on she states: ". . . the . . . dominant response to her [Chopra] inquiries was apprehension, *F E A R*!" "Richard seeks systematically to intimidate his subordinates." "I will have my retribution." ". . . they neither trust him as a person, or respect him as a manager." ". . . it is leadership by intimidation." "There is no single or overt act, no 'smoking gun' by which he might stand exposed." "His wrongful conduct is more insidious than that. Smoke is visible; the fumes with

which our atmosphere is laden are less visible than smoke, but far more toxic."

The foregoing is ample evidence that the speech for which Lambert was actually reprimanded, was not protected by the First Amendment. Even assuming arguendo she was reprimanded for *all* of the personal attacks against Richard that were contained in her speech, not just the ones specifically mentioned by Richard, Lambert's speech was still not protected by the First Amendment. Assuming even further that Lambert *was* reprimanded for her *entire* speech, and that speech did contain matters of public concern, her series of personal attacks against Richard removed any First Amendment protection her speech may have had.

II.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN EMPLOYEE'S SPEECH, IN ORDER TO CONSTITUTE SPEECH UPON A MATTER OF PUBLIC CONCERN MUST ADDRESS ONE OF THE FOLLOWING: 1) SPEECH MUST BE OF PUBLIC IMPORT IN EVALUATING A PUBLIC OFFICIAL; 2) SPEECH INDICATING A PUBLIC OFFICE WAS NOT DISCHARGING ITS GOVERNMENTAL DUTIES; 3) SPEECH THAT BRINGS TO LIGHT ACTUAL OR POTENTIAL WRONGDOING ON THE PART OF GOVERNMENTAL OFFICIALS?

The Ninth Circuit Court of Appeals indicated in its opinion in *Lambert v. City of Santa Ana*, 59 F.3d 134 (9th Cir. 1995), that plaintiff, Barbara Lambert, an

employee of the Santa Ana Public Library, spoke upon an issue of public concern, when she criticized the management style of defendant Library Director Robert Richard at a City Council meeting on October 15, 1990.

The panel found that: 1) the management style of Richard had become an issue of significant public concern by the time she addressed the City Council; 2) A the function of the public library was among the "most visible" of functions performed by a city government, Lambert had a constitutional right to speak to the Council regarding the issue; 3) she spoke as a union representative describing departmental problems, not private grievances.

It is the position of petitioners that the Ninth Circuit attempts to cast Lambert's speech into a matter of public concern, when Lambert's speech concerns an internal departmental matter that is not an issue of public concern. Further, Lambert's speech indicated no wrongdoing or malfeasance on behalf of Library Director Robert Richard.

To receive protection, speech must be upon a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 142, 75 L.Ed.2d 708, 103 S.Ct. 1684, 1687 (1983). And, to determine whether a matter of public concern was involved, a court must consider the content, form and context of the speech, as revealed by the whole record. *Id.* at 147-148, 103 S.Ct at 1690-1691.

Other circuits, notably the Fourth Circuit, emphasizes that for an employee to state a matter of public concern, the content of the speech must allege wrongdoing or malfeasance on the part of the government office or official. In *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986), it is stated that for a matter to be of public concern, it must relate to wrongdoing or breach of the public trust, not ordinary matters of agency policy.

Similarly, the Seventh Circuit relies heavily on whether the content of the speech is directed toward malfesiance or wrongdoing. *Linhardt v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985); *Phares v. Gustafsson*, 856 F.2d 1003, 1008 (7th Cir. 1988); and *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 586 (7th Cir. 1992)

Interestingly, the cases cited by the Ninth Circuit in its opinion also are concerned with malfeasance, wrongdoing or breach of the public trust. *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2337 (1993); *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988); *Allen v. Scribner*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir. 1987); *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983)

However, the facts of the case at bar do not disclose any of the above.

A. Lambert's speech did not serve to provide information for the public to judge Richard's qualifications

Lambert's speech does not contain any allegations of malfeseance, wrongdoing or breach of the public trust. Neither does the speech provide the public with information that "is of public import in evaluating the performance the District Attorney as a public official." *Connick* at 461 U.S. at 148, 103 S.Ct. at 1690.

Similarly, Lambert's speech does not provide a basis for the public to determine Richard's qualifications for continuing in his post.

The text of her speech (Appendix F) is entitled: "THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP," a quote from management

expert Peter Drucker. She then states: "If Drucker's precept rings true . . . it is the essence of our indictment of Rob Richard, and concomitantly of our plea to the City Council." She goes on to make the following statements: "During Richard's tenure and thanks to his directorship, the spirit of the Library staff has declined dramatically." ". . . under his management, the Santa Ana Public Library still functions, but just barely." "We staffers continue to perform, to do our jobs, but devoid of zest, with leaden hearts and wooden hands."

Clearly, Lambert's speech did not provide a basis for determining Richard's qualifications for continuing in his post. Lambert would undoubtedly argue that Richard managed his employees through intimidation. However, even if his management style was rejected by his employees, Lambert's statements are entirely subjective, and are tied to Richard and his employees' dislike of him, not because of his qualifications or lack of them. Lambert says nothing about the specifics of why the library is "barely functioning"; one receives the impression that the library is "barely functioning" because of the employees' dislike of their supervisor.

Further evidence of the fact that the above speech does not provide the public with a basis for evaluating Richard's qualifications comes from the speech itself. The Library *still* functions and the staffers *continue* to perform, albeit allegedly unhappily. Observed on these terms, then, the public, as in *Connick*, is provided with no information to evaluate Richard's qualifications for continuing in his post.

B. Lambert alleged no wrongdoing by Richard

This court, *Connick v. Myers*, in analyzing the public import of Myers' speech, stated, "We do not believe

these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities . . . [n]or did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." (*Connick* at 1691)

Connick is instructive because the questionnaire at issue dealt with office policy, and more specifically, office morale. The questionnaire included items such as fairness of transfers, existence of a rumor mill in the office, office morale, and the level of confidence of the Assistant District Attorneys in five named supervisors. None of these issues were considered by *Connick* to be a matter of public concern.

Similarly, in *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984), plaintiff's remark ("Have you heard the good news?") upon hearing that her supervisor had been terminated, did not suggest that her supervisor had committed some wrongdoing or breach of the public trust. The *Yoggerst* court stated, "we assume that many public employees-like employees in the private sector-would prefer to have another superior. It is also not unreasonable to assume that public employees will occasionally express their feelings toward a supervisor. The First Amendment, though, does not make every expression of a public employee's dissatisfaction with a superior a 'federal case'." *Connick*, at 103 S.Ct at 1690-1691.

It was clear from the content of Yoggerst's statement that she was speaking in her role as an employee about her personal feelings, and not in her role as a citizen, speaking upon a matter of public concern.

The Fourth Circuit has taken the position that matters of public concern "must relate to wrongdoing, or a

breach of trust, not ordinary matters of agency policy." *Daniels v. Quinn*, 801 F.2d 687 (4th Cir. 1986). As a result, another Fourth Circuit case, *Jurgensen v. Fairfax County*, 745 F.2d 868, 888 (4th Cir. 1984) is in accord. In *Jurgensen*, the police department employee disclosed an internal report, which identified issues of low morale, among others, to a newspaper. The court found there was no public concern issue stated by plaintiff: "It [the report] found no illegal action; no abuse of authority or power; it referred to evidence of corruption or waste; it pointed to no discrimination among employees . . ."

Of note in *Phares* the court found the plaintiff did not try to expose wrongdoing, or inform the public of problems with her university department; she merely did not like how her department was run.

In Lambert's statement, there is no attempt to attribute wrongdoing or breach of the public trust to Richard, but rather her speech launches into a personal attack on Richard.

Lambert's expression opens with "THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP." In the fourth line, she states ". . . is the essence of our indictment of Rob Richard . . .", and thus sets the tone for the speech. Further on she states: ". . . the . . . dominant response to her [Chopra] inquiries was apprehension, *F E A R*!" "Richard seeks systematically to intimidate his subordinates." "I will have my retribution." ". . . they neither trust him as a person, or respect him as a manager." ". . . it is leadership by intimidation." **"There is no single or overt act, no 'smoking gun' by which he might stand exposed."** (Again, the nebulousness if the entire speech is underscored — there is no concrete wrongdoing alleged.) "His wrongful conduct is more insidious than that. Smoke is visible;

the fumes with which our atmosphere is laden are less visible than smoke, but far more toxic."

Lambert mentions "wrongdoing", but alleges no facts. She presents only nebulous statements; in fact, she admits there is "no act . . . by which he might stand exposed." She further states that "during Richard's tenure, . . . the **spirit** of the Library staff has declined dramatically." Note there is nothing in Lambert's speech stating any wrongdoing, or breach of the public trust; simply a nebulous statement about the "spirit" of the library.

III.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SPEECH UPON THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY CONSTITUTES INHERENT MATTERS OF PUBLIC CONCERN?

Speech that deals solely with the internal workings of a government agency does not constitute inherent matters of public concern.

Connick v. Myers stated that "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior" citing *Bishop v. Wood*, 426 U.S. 341 at 349-350, 96 S.Ct. 2074 at 2079-2080 (1976).

In *Jurgensen v. Fairfax County, Virginia*, 745 F.2d 868 (4th Cir. 1984), a member of the County Police

Department leaked to a newspaper an internal memorandum that concerned an internal review of a particular section of the department. The newspaper then published an article based on that report, as well as employee interviews.

The report revealed no illegal action; it identified no abuse of authority or power, no corruption or waste, nor discrimination among employees. The report *did* identify that as a result of a "4-10" schedule and understaffing, "a working environment [was created] that at times is nearly impossible from both a personal and an agency perspective." Plaintiff claimed he was demoted for leaking the internal report in derogation of his free speech rights.

Jurgensen stated:

> "If the speech relates primarily to a matter of "limited public interest", and "does not seek to bring to light actual or potential wrongdoing of breach of public trust", centering instead on matters primarily, if not exclusively "of personal interest" to the employee such as employee grievances over internal working conditions, etc., that fact must be weighed in determining whether a matter of true public concern is involved for the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs" *Jurgensen*, at p. 879, citing *Connick*, 103 S.Ct. at 1691.

Further, where personal or employee grievances are more the subject matter of the speech than matters of public interest, it is the rule that "a wide degree of deference to the employer's judgment is appropriate." *Connick*, at 103 S.Ct. 1692. This court's case, *Waters v.*

Churchill, __ U.S. __, 128 L.Ed.2d 686, 114 S.Ct. 1878, 1888 (1994), echoed a similar principle:

> "The key to government decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer . . . [W]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate"

Focusing on the language of the report in *Jurgensen*, the court concluded that "it seems pretty obvious" that the report did not include material of any substantial public concern; it "brought to light [no] wrongdoing or breach of trust." It dealt more accurately with what would be characterized as "internal office policy" of an agency, citing *Connick*, 103 S.Ct. at 1688, 1690-91

The internal report which Jurgensen leaked to the newspaper dealt solely with internal issues: work schedules and understaffing. These factors created a "working environment that at times was nearly impossible . . ." The court found that the working environment, even one such as *Jurgensen* was not a matter of public concern.

The internal working environment described by Lambert focused on employee attitudes of the Library Director Richard and the library staff; by contrast, *Jurgensen* concerned understaffing, which was certainly of greater import than the alleged "demoralization" of the spirit of the library Lambert describes in her speech.

Lambert argued in her brief to the Ninth Circuit Court of Appeals that her speech concerning the low morale of the library staff constituted an issue of public concern. *Jurgensen* makes clear that "low morale" is part of the

working environment, and is not an issue of public concern.

There are other cases that have held that the internal workings of a government agency do not constitute inherent matters of public concern.

In *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993) at 1343, there were three instances of speech in issue. Plaintiffs, being opposed to the hiring of a new firefighter asked a city councilmember to second a motion "tabling" the hiring. The court found that this speech was not protected by the First Amendment, as it was not upon a matter of public concern, as "they entered into the realm of interefering with government personnel decision, which is normally not a matter of public concern", citing *Connick* at 461 U.S. 147, 103 S.Ct at 1690.

Lambert, too, injected herself into a personnel decision. After Lambert indulged in her personal criticism of Richard, she ended her speech with the words: "It requires courage, immense courage, to speak out against, our library director, but we feel *immediate action* is [absolutely] necessary." (Emphasis added.) Similar to the *Shands* plaintiffs, Lambert was asking the city council to effect a personnel decision, whether it be to reprimand, replace or remove Director Richard, clearly not a matter of public concern.

The issue of whether comments about the work habits of a co-worker are protected speech was examined in *Thomasson v. Modlinski*, 876 F.Supp. 818 (E.D.Va. 1995). Plaintiff and others had observed that a co-worker was arriving late, leaving early, and did not attend to her tasks during the workday. Plaintiff and others requested defendant conduct an investigation, which did not substantiate plaintiff's claims. Plaintiff and others began to harass the co-worker, which lead to

plaintiff's suspension, and ultimately termination. He claimed his First Amendment rights were violated as a result of his speech to Modlinsky concerning his co-worker's work habits. The court found the speech to be "most accurately characterized as an employee grievance concerning internal office policy," citing *Connick* at 103 S.Ct. at 1694.

Lambert's speech was also an attempt to complain about the habits of a co-worker — that of her supervisor. As such, it did not constitute a matter of public concern.

IV.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A FULL *CONNICK* ANALYSIS OF THE CONTENT, FORM AND CONTEXT IS NECESSARY WHEN THE SPEECH INVOLVED IS NOT UPON INHERENT MATTERS OF PUBLIC CONCERN, BUT CONCERNS ONLY THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY?

For a speech by a government employee to be protected by the First Amendment, it must be upon a matter of public concern, *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687.

A primary issue of this Petition, as before the Ninth Circuit Court of Appeals, *Lambert v. City of Santa Ana, et al.*, 59 F.3d 134 (9th Cir. 1995), was whether the speech of plaintiff Barbara Lambert was upon a matter of public concern.

Petitioners, City of Santa Ana, Library Director Rob Richard and City Manager David Ream argue vigorously

that Lambert's speech addressed an internal personnel issue, not an issue of public concern.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct 1684 at 1690.

It is because all speech which is made in and about a public employment setting will have some public significance, a court must focus on these factors, which the Ninth Circuit did not do in rendering its decision in *Lambert v. City of Santa Ana, supra.*

The Courts have adopted differing approaches for determining whether employee speech is upon a matter of public concern, as noted in *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir. 1993). It is the circumstances of a particular case that govern the appropriate approach under *Connick*. One approach is content-based, while the other speaks to subjective intent.

The content-based approach is applied when a public employee speaks upon a topic which is clearly an inherent matter of public concern. *O'Connor*, at 914. *Connick* and its progeny have identified these "inherent" matters of public concern: The speech or expression that relates information that is of "public import in evaluation the performance" of a public official, speech or expression indicating that a public office is not discharging its governmental responsibilities or speech that "bring[s] to light actual or potential wrongdoing or breach of public trust on the part of governmental officials." When one of these issues is raised, the public concern dimension is obvious, and the cases provide summary analysis for the conclusion that such speech is upon a matter of public concern.

Conversely, employee speech that, based on content alone, does not qualify as a matter of inherent public concern (e.g. internal working conditions), affecting only the speaker and co-workers, may require a more complete *Connick* analysis into the form and context of the public employee expression, as revealed by the whole record. *O'Connor v. Steeves*, 994 F.2d at 914, citing *Connick*, 461 U.S. at 148, 103 S.Ct. at 1690.

Since "almost anything that occurs within an public agency could be of concern to the public, a full-fledged "form and context" analysis is approprioate in these instances." *O'Connor v. Steeves*, citing *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362.

Connick states:

> "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and every criticism directed at a public official — would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691.

In the instant case, the speech of Lambert is concerned with the internal working conditions of the Santa Ana Public Library. In her speech, Lambert states that under Director Richard's management, "the Santa Ana Public Library functions, but just barely." She then goes on to state that "we staffers continue to perform . . . but devoid of zest . . .", and vaguely alleges some sort of cover-up of the results of an "independent study of the Library staff members' attitudes toward, and opinions of Richard."

Lambert has argued, and will certainly continue to argue that these statements were made upon an issue of public concern. These allegedly "public concern"

statements indicate that the Library actually *does* continue to function, and the "cover-up" concerns not some level of wrongdoing, or an investigation that might uncover wrongdoing, but simply a survey of "Library staff members' attitudes toward, and opinions of Richard." There has been no indication the community has, in fact, manifested a legitimate concern in the internal workings of the Library that form the basis of the speech in issue.

In summary, the entire content of Lambert's speech dealt solely with internal working conditions, affecting only Lambert and her co-workers, and, a full *Connick* analysis is appropriate.

A. Assuming arguendo that the content of Lambert's speech may tangentially be upon an issue of public concern, the point of her expression indicates that, in the final conclusion, that the context and form of her speech was not upon a matter of public concern.

As previously stated, *Connick* and its progeny have identified these "inherent" matters of public concern: the speech or expression that relates information that is of "public import in evaluation the performance" of a public official; speech or expression indicating that a public office is not discharging its governmental responsibilities; or speech that "bring[s] to light actual or potential wrongdoing or breach of public trust on the part of governmental officials." *Connick*, at 103 S.Ct. 1690-1691.

In contrast, speech that does not qualify, based on content alone, as a matter of public concern requires a more complete *Connick* analysis into the form and

context of the employee speech. In the instant case, Lambert's speech was upon internal working conditions, affecting only the speaker and her co-workers.

As previously stated, public employees have a right to speak on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687. Determination of whether a matter of public concern is involved is made by analyzing the content, form and context of the employee speech, as revealed by the entire record. *Id.* at 147-148, 103 S.Ct. 1690-1691.

The cases that follow illustrate that a finding of incidental or nominal public concern content does not necessarily indicate the entire speech is protected; the form and the context must be analyzed. Prominent in this analysis of the point of the speech, and motivation of the employee making the speech.

In *Phares v. Gustafsson*, 856 F.2d 1003 (7th Cir. 1988), the court assumed that the content of plaintiff's speech, her claim that she was required to indirectly diagnose animals contrary to Illinois law, was of some interest to the public. This assumption was made not for the actual content of the speech, but as the district court granted a motion for a directed verdict, all evidence and reasonable inferences had to be considered in the light most favorable to the nonmovant plaintiff.

However, states *Phares*, 856 F.2d at 1008, *Connick* requires a court to look at the form and context of the speech at issue. *Phares*, citing *Connick* at 461 U.S. 147-148, 103 S.Ct. 1690-1691. It is within the form and context that the point of the speech is analyzed. Citing *Linhart v. Glatfelter*, 771 F.2d 1004 at 1010 (7th Cir. 1985) *Phares* continues:

> "The *Connick* test requires us to look at the point of the speech in question: was it the

> employee's point to bring wrongdoing to light? Or was it to raise other issues of public concern? Or was the point to further some purely private interest?" *Phares*, 856 F.2d 1003, 1008.

The *Phares* concluded that the form and context of her speech indicated that plaintiff's speech did not touch upon a matter of public concern. Her speech took the form of a complaint to the university's grievance procedures. The content of her expression indicated that she was not attempting to expose wrongdoing in her department at the university; she was merely dissatisfied with "certain internal decisions made by [her] immediate superiors."

In *Linhart v. Glatfelter*, 771 F.2d 1004, plaintiff, acting chief of police, who had designs on the job himself, met with one of the candidates and asked the candidate what his intentions were regarding the village manager, the defendant. This conversation, apparently instigated by the village president, who supported plaintiff in his quest for the position of chief, came to the attention of the village manager. The village manager then issued a written reprimand to plaintiff.

The court in *Linhart* found that although there might be an element of public concern regarding plaintiff's statement, the *Connick* test "does not consist in looking at what might be incidentally conveyed by the fact the employee spoke in a certain way . . . the test requires we look at the *point* of the speech in question . . ." *Linhart*, at 1010. (Emphasis in original.)

Linhart noted that if plaintiff's speech had accused the defendant of inefficiency or incompetence, or publicly criticized the administration of a city official for its conduct in office, such speech would be protected. *Id.* at 1011.

Analyzing Lambert's statement, it is clear the point of the speech was to level personal criticism of Library Director Richard, and to have him removed, reprimanded or replaced. In her discourse, she sought to register the dislike of Richard by herself and supposedly the entire Library staff; she cited examples of his behavior she found objectionable; and finally concluded with the statement that "It requires courage . . . to speak out against our library director, but we feel immediate action is [absolutely] necessary."

Finally, the issues raised by Myers of morale and discipline were of public concern, but *Connick* looked beyond that fact to the Myers' role in raising them:

> "While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office, but rather to gather information for another round of controversy with her supervisors." *Connick* at 461 U.S. 138 at 150, 103 S.Ct. 1691.

Similarly, the focus of Lambert' speech was a personal attack on Richard, and indicated her desire to have him removed, reprimanded or replaced. There was no attempt by Lambert to expose wrongdoing or a breach of the public trust on Richard's part.

Lambert's focus was similar to that of the plaintiffs in *Colburn v. Trustees of Indiana University*, 973 F.2d 581. There, the plaintiffs were nontenured instructors in a department plagued by departmental infighting that was threatening plaintiffs' careers. They appealed to university officials outside their department, concerned for their academic futures.

The *Colburn* court found that plaintiff's letters were attempts to seek intervention among the warring factions in the department. There was no attempt to expose malfeasance. *Colburn*, at 586.

Both Lambert and the *Colburn* plaintiffs sought interverntion in the hopes of bringing calm to perceived disorder; that was the point of both expressions, not to inform the public of wrongdoing. Both complaints dealt with localized disputes that were of import only to those involved.

B. The form and context of Lambert's speech indicated she was speaking as an employee, not as a citizen.

Connick v. Myers, 461 U.S. 138 at 147, 103 S.Ct. at 1690, described the difference between matters of public concern and matters of personal interest:

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency, allegedly in reaction to the employee's behavior."

Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988) at 1445, similarly analyzed the focus of the employee speech in question, looking to the role in which the employee spoke:

> "The focus is on the role the employee has in advancing the particular expressions: that of a concerned public citizen, informing the public that a public institution is not properly discharg-

> ing its duties, or engaged in some way in misfeasance, malfeasance, or non-feasance, or, merely as an employee, concerned with only the internal policies or practices which are of relevance only to the employees of that institution?"

Lambert was not speaking as a public citizen, but rather as an employee, concerned with the internal functions of the Santa Ana public Library. As previously indicated, she stated no malfeasance, or wrongdoing on the part of Director Richard. Her complaints were only relevant to the employees of her workplace. She stated the library was functioning, but the "spirit" of the library staff "had declined dramatically." She admits there is "no single overt act . . ." "His wrongful conduct is more insidious than that", and further, "the fumes with which our atmosphere is laden is less visible than smoke, but far more toxic."

It is obvious that these remarks by Lambert are not raised as a concerned public citizen, but as an unhappy employee. As such, it is not an issue for the intervention of the federal courts.

Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992) involved a university department where much infighting had occured. Plaintiffs had contacted individuals in the university administration about the situation, concerned about the effect the situaion was having on their careers. *Colburn* stated that neither plaintiffs' goal was to bring the hostility to light because they felt it was of significance to the community, but to bring calm to disorder through intervention:

> "Where the overriding reason for the speech is the concerns of a few individuals whose careers may be on the line, the speech looks more like

> an internal personal dispute than an effort to make the wrongdoing public." *Colburn*, at 587.

Lambert stated in her speech that Richard would intimidate his subordinates by telling them he could "write them out of the budget" or "I will have my retribution." These statements, if true, indicate, like the plaintiffs in *Colburn*, that employees feared for their jobs.

Once again, these comments by Lambert serve to underscore the internal, private nature of the subject to which the speech is directed.

C. Context alone cannot transform a private matter into one that is an issue of public concern.

The context in which a public employee expresses himself may be relevant in the determination of whether the speech expressed a matter of public concern, however, states *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991), at 1415-1416, "context alone cannot transform an inherently self-interested opinion into one that implicates public issues."

Dr. Caine was a anesthesiologist who had his clinical privileges suspended for among other things, his speech opposing the plan of defendant Hardy, who was Chief of the Anesthesiology, to obtain an exclusive anesthesiology contract for himself and two partners. This would essentially freeze out plaintiff and other anesthesiologists from practicing at the hospital. Dr. Caine claimed that his speech was a matter of public concern, in that the public had a right to know whether the hospital had entered into this exclusive contract.

The *Caine* court found that although one may speculate that Dr. Caine had raised an issue of public oncern, a "similarly attenuated" argument had been rejected in *Connick v. Myers*, 461 U.S. at 148-149, 103 S.Ct. at 1690. The *Caine* court continued, paraphrasing *Connick*:

> "By such reasoning, any activity that occurs within a government office might be deemed a matter of public concern. Such a constitutionalization of primarily intra-office disputes would invite undesirable judicial interference into mundane governmental operations, however with hardly even a marginal effect on the vigorous debate of public issues secured by the First Amendment." *Caine*, at 1416.

Finally, the court concluded at page 1416:

> "Had Dr. Caine proclaimed his opposition from the steps of the Mississippi capitol, the characterization of his speech would not differ. His remarks concerned solely the internal management of the hospital . . . and reflected an intra-office dispute rather than an opinion necessary for society to make an informed decision."

Lambert made her speech before the City Council, a meeting that was televised via a local cable channel. The Ninth Circuit opined that this setting assisted in the determination that Lambert's speech was a matter of public concern. However, as her speech actually concerned only an internal matter, the Library staff's discontentment with Library Director Richard, and her (their) desire for a new supervisor. As *Caine* illustrates, if a subject matter is not an issue of public concern, public dissemination will not transform it into such an issue.

CONCLUSION

Petitioners therefore respectfully urge this Court to issue a writ of certiorari on each of the questions presented herein for review.

Dated: October 6, 1995.

Respectfully submitted,

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CITY OF SANTA ANA,
DAVID REAM and
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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA LAMBERT; SANTA ANA CITY;
SANTA ANA CITY EMPLOYEES ASSOCIATION,
Plaintiffs-Appellees,

v.

ROBERT RICHARD, Director, Library Department
Director, DAVID REAM, City Manager;
CITY OF SANTA ANA,
Defendants-Appellants.

No. 94-55129
D.C. No. CV-91-0212 RMT
OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Submitted June 6, 1995*
Pasadena, California

Filed July 10, 1995

Before: Betty B. Fletcher, Charles Wiggins,
and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fletcher

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

OPINION

FLETCHER, Circuit Judge:

The City of Santa Ana, Robert Richard, its Library Department Director, and its City Manager, David Ream, defendants in a Section 1983 action,[1] appeal the judgments against them imposing liability, awarding damages, injunctive and declaratory relief, and denying qualified immunity to the individual defendants. The suit arises out of a letter of reprimand sent by Richard to Barbara Lambert, a library employee and union representative, for her statement before the City Council in her capacity as a representative of the Santa Ana City Employees Association (SACEA) criticizing Richard.

PROCEDURAL HISTORY

On November 23, 1992, the district court granted the plaintiffs' motion for summary judgment on the issue of liability, finding all of the defendants liable for violating the plaintiffs' First Amendment rights, and denied the defendants' motion for summary judgment seeking dismissal. It also held that plaintiffs were entitled to declaratory and injunctive relief. On July 26, 1993, the court granted the plaintiffs' motion for summary judgment denying qualified immunity to the individual defendants, but declined to rule on the defendants' motion for summary judgment requesting immunity. On August 5, 1993, a jury awarded Lambert $10,000 in compensatory damages from the City, Ream and Richard, and $20,000 in punitive damages from Richard.

On appeal, the defendants do not appeal the amount of damages or the appropriateness of the other remedies

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[1] The district court dismissed the state law claims.

imposed by the district court. The principal thrust of their challenge to the district court's rulings is their contention that the employee's speech was not entitled to First Amendment protection because it did not address a matter of public concern. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

FACTS

On October 15, 1990, Lambert appeared before the Santa Ana City Council on behalf of SACEA. She read a prepared statement in which she criticized Library Director Robert Richard's management practices. She asserted that the library was just "barely" functioning as a result of Richard's mismanagement, and asked the council to turn over to SACEA a study of library staff attitudes toward Richard.

Lambert was not the first city employee to publicly question Richard's job performance. Librarians had begun wearing anti-Richard buttons to work. Two weeks before Lambert addressed the council, SACEA President Eddie Bentley had complained to that body about the lack of communication between library staff and Richard, and the staff's lack of confidence in Richard. Santa Ana Mayor Dan Young had asked Ream to investigate Bentley's allegations and to report back to the council within two weeks.

In November, Richard issued a letter of reprimand to Lambert "for insubordinate action taken by [her] at an evening session of the City Council and for not utilizing established procedures for a grievance." The letter was placed in Lambert's personnel file. After Ream rejected the SACEA's demand that the letter be withdrawn and that Richard be disciplined for violating Lambert's constitutional rights to speak, petition, and engage in union activities, Lambert and the SACEA sued Richard,

Ream, and the City. They sought declaratory and injunctive relief and damages under 42 U.S.C. § 1983, for violations of Lambert's First and Fourteenth Amendment rights, and under the Meyers-Milias-Brown Act, California Government Code § 3500 *et seq.* They also requested an order directing the defendants to rescind the letter of reprimand.

DISCUSSION

We review de novo the district court's grant of summary judgment. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). We determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

The Supreme Court outlined the test for First Amendment protection of government employees' speech in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). To receive protection, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury that the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Id.* at 572-74; *Waters v. Churchill*, 114 S. Ct. 1878, 1884 (1994).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). This is a question of law. *Id.* at 148 n.7. "Speech focused solely on internal policy and personnel grievances does not implicate the First Amendment." *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992),

cert. denied, 113 S. Ct. 2337 (1993). We review de novo whether Lambert's speech is a matter of "public concern." *Id.* at 1134.

[1] There is no question that Richard's management style had become an issue of significant public concern by the time Lambert spoke to the council. Among the district court's factual findings undisputed in the record were that "[p]rior to October 15, 1990, the tension between the staff of the City Library and defendant Richard became the subject of public discussion. SACEA and its members employed by the library had protested to City management regarding Richard's conduct. The protests included assertions that Richard mismanaged the library department and treated employees in an abusive and intimidating manner, and that Richard's conduct was having an adverse effect on service to the public."

[2] Lambert told the council that the library was "barely" functioning and that employees who dealt regularly with the public were performing "devoid of zest, with leaden hearts and wooden hands." Given that operation of a public library is among the most visible of the functions performed by city governments, Lambert had a Constitutional right — and perhaps a civic duty — to inform the council if library service was jeopardized by poor management at the top. *See Connick*, 461 U.S. at 148 ("discipline and morale in the workplace are related to an agency's efficient performance of its duties"); *Hyland*, 972 F.2d at 1137 (holding abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law enforcement officials "are of vital interest to citizens in evaluating the performance of their government"); *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1405 (9th Cir. 1988) ("misuse of pubic funds, wastefulness, and inefficiency in managing and operating governmental

entities" are matters of public concern); *Allen v. Scribner*, 812 F.2d 426, 431 (9th Cir.) *amended*, 828 F.2d 1445 (9th Cir. 1987) (competency of project management as well as efficient performance of project duties constitute matters of public concern); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (competency of police force surely matter of great public concern, as is interrelationship between city management and its employees).

[3] The appellants' claim that Lambert's speech was merely "a petty personnel grievance in which she and some of her fellow library employees were personally interested and involved" is belied by the facts that Lambert spoke as a union representative, not as an individual, and that she described departmental problems, not private grievances. *Cf. Connick*, 461 U.S. at 141 (not a matter of public concern when remarks "reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre"); *Havekost v. United States Dep't of Navy*, 925 F.2d 316, 318 (9th Cir. 1991) (holding complaint about dress code and staffing policies "nothing more than a workplace grievance" and noting that a "critical inquiry is whether employee spoke in order to bring wrongdoing to light or merely to further some purely private interest"); *McKinley*, 705 F.2d at 1114 ("Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies").[2] The fact that Lambert spoke at a televised

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[2] We reject the appellants' argument that even if parts of Lambert's speech touched on matters of public concern, she was reprimanded not for these but for other parts of her speech that were merely character assassination, as permitted by *Waters*, 114 S. Ct. at 1891.

(continued)

city council meeting underlines the public nature of the Richard controversy.[3]

[4] Because Lambert's remarks were so clearly protected, Richard and Ream were not entitled to qualified immunity. When the law is clearly established, public officials are immune only when they objectively could have believed that their conduct was lawful. *Act Up/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). In light of the prior public criticism and the city manager's investigation of Richard, and the fact that Lambert appeared before the city council as a union official, any reasonable official quickly would have recognized Lambert's speech as one addressed to a matter of public concern. The actions taken by Richard and endorsed by Ream were retaliatory, not reasonable.

CONCLUSION

The district court correctly determined that Lambert's remarks to the City Council addressed a matter of public concern. Therefore, the court properly granted the plaintiffs' motion for summary judgment and denied the defendants' motion for summary judgment on the issue

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(fn. continued)
While the letter of reprimand singles out certain comments that Lambert made to the council, these are mentioned as examples of the inappropriate nature of the entire statement. *See also Anderson v. Central Point School Dist. No. 9*, 746 F.2d 505 (9th Cir. 1984) ("*Connick* does not require every work of a communication to be of interest to the public.").

[3] The defendants contend that the forum in which the statement is made can be considered only in the second half of the *Pickering* test, i.e., whether the employee's interest in free expression is outweighed by the employer's interest in work place efficiency. However, this argument was rejected by the *Connick* majority. *Connick*, 461 U.S. at 159 (Brennan, J., dissenting).

of section 1983 liability. Because reasonable public officials in Richard's and Ream's positions would have recognized that Richard's conduct was unlawful, the district court did not err in granting the plaintiffs' motion for summary judgment denying qualified immunity to the individual defendants.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
NOV 24 1992
Clerk, U.S. District Court
Central District of California
By _____ Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

SANTA ANA CITY EMPLOYEES ASSOC., et al.,
Plaintiffs,
vs.
CITY OF SANTA ANA, et al.,
Defendants.

No. CV 91-0212-RMT (Ex)

ORDER GRANTING MOTION BY PLAINTIFFS FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART MOTION BY DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT

This matter having come before the court on the cross-motions by plaintiffs Santa Ana City Employees Association and Barbara Lambert and defendants City of Santa Ana, et al. for summary judgment, and the court having considered the pleadings and other documents filed herein and having filed findings of fact and conclusions of law concurrently herewith,

IT IS ORDERED that:

1. The motion by plaintiff Santa Ana City Employees Association for summary judgment on the first cause of action for violation of 42 U.S.C. § 1983 is granted as to liability against all defendants and as to declaratory and injunctive relief against defendant City of Santa Ana. Accordingly, defendant City of Santa Ana has no right to discipline, and is therefore enjoined from disciplining, City employees for speeches that they make to the City Council which are a matter of public concern.

2. The motion by defendants City of Santa Ana, et al. for partial summary judgment is granted in part and denied in part as follows:

a. as to the first cause of action for violation of 42 U.S.C. § 1983, summary judgment having been granted in favor of plaintiff, the motion by defendants for partial summary judgment as to said cause of action is denied.

b. as to the second cause of action for violation of the Meyers-Milias-Brown Act, the motion by defendants for partial summary judgment is granted.

Dated: 11/23/92

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
NOV 24 1992
Clerk, U.S. District Court
Central District of California
By _____ Deputy

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SANTA ANA CITY EMPLOYEES ASSOC., et al.,
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CITY OF SANTA ANA, et al.,
Defendants.

No. CV 91-0212-RMT (Ex)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the court on the cross-motions by plaintiffs Santa Ana City Employees Association and Barbara Lambert and defendants City of Santa Ana, et al. for summary judgment, and the court having considered the pleadings and other documents filed herein, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Santa Ana City Employees Association ("SACEA") is the exclusive bargaining representative for all non-supervisory, non-professional employees of the defendant City of Santa Ana (the "City"), including all non-supervisory library employees.

2. Plaintiff Barbara Lambert ("Lambert") has been an employee of the City since 1966 and is the director of SACEA. At all times relevant hereto, Lambert was employed in the library department.

3. At all times relevant hereto, defendant Robert Richard ("Richard") has been employed by the City as the Library Director.

4. At all times relevant hereto, defendant David Ream ("Ream") has been employed by the City as City Manager.

5. Prior to October 15, 1990, the tension between the staff of the City library and defendant Richard became the subject of public discussion. SACEA and its members employed by the library had protested to City management regarding Richard's conduct. The protests included assertions that Richard mismanaged the library department and treated employees in an abusive and intimidating manner, and that Richard's conduct was having an adverse effect on service to the public.

6. On October 1, 1990, at a public meeting of the Santa Ana City Council, SACEA President Eddie Bentley ("Bentley") spoke to the Council, citing a lack of communication between library staff and the Library Director and a lack of confidence in the Library Director. Bentley requested that the Council direct the City Manager to investigate circumstances causing library staff members to work in fear of their jobs. Mayor

Young requested the City Manager to investigate and provide a status report to the Council within two weeks.

7. On October 15, 1990, pursuant to a request from Bentley, Lambert addressed the Council at a public meeting during the public comments period. The proceedings were televised via cable to approximately 20,000 dwelling units in the City.

8. In her remarks, Lambert communicated to the Council her belief and the belief of many of her fellow workers that Library Director Richard was mismanaging the City's libraries and that his conduct was causing great damage to the public, the library and the library's employees.

9. On or about November 2, 1990, defendant Richard issued to Lambert a letter of reprimand "for insubordinate action taken by you at an evening session of the City Council and for not utilizing established procedures for a grievance." The reprimand accuses Lambert of making insubordinate statements when she criticized Richard in her remarks to the City Council and stated that the letter will be placed in Lambert's personnel file.

10. SACEA, though counsel, protested the letter of reprimand by a letter to City Manager Ream dated November 12, 1990. SACEA demanded that the letter of reprimand be withdrawn and that Richard be disciplined for violating Lambert's constitutional and statutory rights to speak, petition and engage in union activity.

11. The letter of reprimand has not been rescinded.

12. Defendant Richard knew that Lambert was an officer of SACEA.

13. Plaintiffs filed a complaint against defendants for infringement of their rights under the First and Fourteenth Amendments in violation of 42 U.S.C. § 1983 and for violation of the Meyer-Milias-Brown Act, California Government Code § 3500, *et seq.* (the "Act").

14. Defendants have not asserted the existence of a governmental interest in the punishment of speech.

15. Plaintiff Lambert has not provided any evidence that she filed a petition for writ of mandamus to enforce a memorandum of understanding or that she filed a government tort claim for money damages.

16. Plaintiffs do not address the merits of their second cause of action for violation of the Act in opposition to defendants' motion for summary judgment.

Any finding of fact which may be deemed a conclusion of law is hereby incorporated into the Conclusions of Law below, and any conclusion of law which may be deemed a finding of fact is hereby incorporated into the Findings of Fact above.

CONCLUSIONS OF LAW

1. This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

2. Defendant Richard acted under color of state law in his capacity as Library Director. Defendant Ream acted under color of state law in his capacity a City Manager.

3. In evaluating whether or not the City violated Lambert's First Amendment rights, the "threshold inquiry is whether the statements at issue address a matter of public concern . . . [S]uch speech occupies the 'highest rung of the hierarchy of First Amendment value' . . . It is 'more than self-expression; it is the essence of self-government,' worthy of special protection." *Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987). (citations omitted).

4. Whether an employee's speech involves a matter of public concern is a question of law, *Connick v. Myers*, 461 U.S. 138, 148 n. 7, 103 S.Ct. 1684, 1690-91 n. 7

(1983), and must be determined through consideration of the content, form and context of the statement. *Id.*, 471 U.S. at 147-48.

5. Lambert's speech was a matter of public concern.

6. The court must balance the right of Lambert to comment on matters of public concern against the interest of the City as an employer in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968).

7. To find that the City's interest as an employer in efficient functioning outweighs Lambert's First Amendment rights, defendants must demonstrate actual, material and substantial disruption caused by the speech. *Roth v. Veterans' Administration of Govt. of United States*, 856 F.2d 1401, 1407 (9th Cir. 1988).

8. Defendants have not established the existence of an overriding governmental interest that justifies the punishment of speech or that Lambert's speech resulted in actual disruption.

9. By issuing a letter of reprimand to Lambert and by refusing to rescind it, Richard violated Lambert's First Amendment rights to free expression. *Allen v. Scribner, supra; McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983).

10. The proper remedy for a violation of the Meyer-Milias-Brown Act, California Government Code § 3500 *et seq.*, is an equitable action for writ of mandamus. *San Leandro Police Officers Ass'n v. City of San Leandro*, 55 Cal. App. 3d 553, 127 Cal. Rptr. 856 (1976).

11. The action for writ of mandamus is to enforce the provisions of a memorandum of understanding or to compel the public entity to refrain from interfering with employees' rights to participate in union activities.

Glendale City Employees' Ass'n v. City of Glendale, 15 Cal. 3d 328, 343-44, 124 Cal. Rptr. 513 (1975).

12. A claim for money damages under the Act requires that plaintiff file a government tort claim pursuant to California Government Code § 910, *et seq.* *San Leandro Police Officers Ass'n, supra* 55 Cal. App. 3d at 559.

13. Plaintiffs have not come forward with any evidence to establish that a government tort claim was filed or that a memorandum of understanding exists.

14. Summary judgment should be granted in favor of plaintiffs against all defendants for liability on the first cause of action for violation of 42 U.S.C. § 1983 and in favor of plaintiffs against defendant City for declaratory and injunctive relief on the first cause of action for violation of § 1983.

15. Summary judgment should be granted in favor of defendants on the second cause of action for violation of the Meyer-Milias-Brown Act, California Government Code § 3500, *et seq.*

16. There are genuine issues of material fact on defendants' assertion of official immunity.

Dated: 11/23/92

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUL 26 1993
Clerk, U.S. District Court
Central District of California
By _____ Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

SANTA ANA CITY EMPLOYEES ASSOC., et al.,
Plaintiffs,
vs.
CITY OF SANTA ANA, et al.,
Defendants.

No. CV 91-0212-RMT (Ex)

ORDER GRANTING MOTION BY PLAINTIFF FOR SUMMARY JUDGMENT ON DEFENDANTS' CLAIMS OF QUALIFIED IMMUNITY

This matter having come before the court for hearing on July 19, 1993, on the motion by plaintiffs Santa Ana City Employee Association and Barbara Lambert for summary judgment on defendants' claims of qualified immunity, and the court having considered the pleadings and other documents filed herein and argument of counsel, and having filed findings of fact and conclusions of law concurrently herewith,

IT IS ORDERED that the motion by plaintiffs Santa Ana City Employees Association and Barbara Lambert for summary judgment on defendants' claims of qualified immunity is granted.

Dated: 7/26/93

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUL 26 1993
Clerk, U.S. District Court
Central District of California
By _____ Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

SANTA ANA CITY EMPLOYEES ASSOC., et al.,
Plaintiffs,
vs.
CITY OF SANTA ANA, et al.,
Defendants.

No. CV 91-0212-RMT (Ex)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the court for hearing on July 19, 1993, on the motion by plaintiffs Santa Ana City Employee Association and Barbara Lambert for summary judgment on defendants' claims of qualified immunity, and the court having considered the pleadings and other documents filed herein and argument of counsel, the court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The court hereby incorporates by reference its November 24, 1992, findings of fact as if fully set forth herein.

2. Defendants Robert Richard ("Richard") and David Ream ("Ream") maintain that they are entitled to qualified immunity since they reasonably believe that their conduct was lawful.

3. The facts and circumstances which Richard and Ream submit in support of their claims to qualified immunity are the following: (a) prior to October, 1990, library staff "were making a political issue" of their dissatisfaction with Richard's management style; (b) Union President Eddie Bentley called Richard a "Hitler and a dictator"; (c) an anti-Richard petition drive was under way; (d) anti-Richard articles appeared in local newspapers and a national library periodical; (e) protesters carried placards at the October 1, 1990, council meeting; (f) at the council meeting, the City Manager told the City Council that he would report to the Council about the subject of the complaints; (g) Lambert should have followed the proper grievance procedure.

Any finding of fact which may be deemed a conclusion of law is hereby incorporated into the Conclusions of Law below, and any conclusion of law which may be deemed a finding of fact is hereby incorporated into the Findings of Fact above.

CONCLUSIONS OF LAW

1. The court hereby incorporates by reference its November 24, 1992, conclusions of law as if fully set forth herein.

2. To overcome the defendants' claims of qualified immunity, plaintiffs must establish that the conduct at issue violated rights that were clearly established at the time of defendants' misconduct. If plaintiffs meet this burden, the burden shifts to the defendants to establish that a reasonable public official could have believed that his conduct was lawful. *Elder v. Holloway*, 975 F.2d 1388, 1394 (9th Cir. 1992); *Act Up!/Portland v. Bagley*, 971 F.2d 298, 301 (9th Cir. 1992).

3. Lambert's right under the first amendment to be free from discipline for her speech before the City Council regarding a matter of public concern was clearly established at the time Richard, with Ream's subsequent ratification, issued to Lambert the letter of reprimand. *Burgess v. Pierce County*, 918 F.2d 104, 105-06 (9th Cir. 1990); *Roth v. Veteran's Administration of Government of U.S.*, 856 F.2d 1401, 1405 (9th Cir. 1988); *Anderson v. Central Point School District*, 764 F.2d 505 (9th Cir. 1984).

4. Defendants' contention that their conduct was reasonable based upon Lambert's failure to follow the specific grievance procedure for library employees is without merit. *See Burgess, supra*, 918 F.2d 104, 106 (9th Cir. 1990), *citing Knapp v. Whitaker*, 757 F.2d 827, 845-46 (7th Cir. (1985) (public employee speech to school board on matter of public concern protected despite "chain of command" administrative policy).

5. Lambert's speech was made during the public comments period of the City Council meeting and was pursuant to a request from the President of the Santa Ana

City Employees Association. It was unreasonable for Richard or Ream to conclude that Lambert had engaged in "insubordinate" action when the issue of Richard's mismanagement had been greatly debated and was clearly a matter of serious concern among the Santa Ana City Council, the Library Department, and the Mayor's Office.

6. The letter of reprimand appears to have been issued in retaliation for Lambert's speaking out against Richard and not for any disruption to the workplace caused by Lambert's actions.

7. It was unreasonable, as a matter of law, for Richard to reprimand Lambert for speaking out on a matter of public concern, and it was likewise unreasonable, as a matter of law, for Ream to ratify the reprimand.

8. Summary judgment should be granted in favor of plaintiffs on defendants' claims of qualified immunity.

Dated: 7/26/93

/s/ ROBERT M. TAKASUGI
ROBERT M. TAKASUGI
United States District Judge

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 23 1993
Clerk, U.S. District Court
Central District of California
By _____ Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

SANTA ANA CITY EMPLOYEES ASSOCIATION, a non-profit corporation, and BARBARA LAMBERT, an individual,
Plaintiffs,

v.

CITY OF SANTA ANA, ROBERT RICHARD, Library Department Director and DAVID REAM, City Manager,
Defendants.

CASE NO. CV 91-0212-RMT (Ex)

JUDGMENT ON SPECIAL VERDICT

This action, between Plaintiff BARBARA LAMBERT, and Defendants CITY OF SANTA ANA, ROBERT RICHARD, and DAVID REAM, came on regularly for trial by jury on August 3, 1993, in Courtroom 22 of the above-entitled Court, the Honorable Robert M. Takasugi, Judge, presiding, with plaintiff represented by Paul Crost, her attorney of record, and defendants appearing by Robert J. Wheeler, their attorney of record; a jury of six persons was duly impaneled and sworn; witnesses testified; and after being duly instructed by the Court, the jury deliberated and thereon duly returned the following special verdict:

"WE, THE JURY in the above entitled action, find the following special verdict on the issues submitted to us:

1. Is Barbara Lambert entitled to recover against the City of Santa Ana, Robert Richard, and David Ream, compensatory damages or nominal damages in the sum of one dollar?

Answer: (Please check one)

__X__ Compensatory damages

_____ Nominal damages in the sum of one dollar

2. If the answer to question 1 is "Compensatory damages," what is the amount of compensatory damages?

Answer: $10,000.00

3. Is Barbara Lambert entitled to recover punitive damages against Robert Richard?

__X__ Yes

_____ No

4. If the answer to question 3 is "yes," what is the amount of punitive damages?

Answer: $20,00.00

Dated: August 5, 1993

/s/ Ron Franko
FOREPERSON"

It appearing by reason of this special verdict, plaintiff is entitled to judgment against defendants in the amount of $10,000.00, and against Defendant ROBERT RICHARD in the amount of $20,000.00. Now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff BARBARA LAMBERT shall have judgment against and recover from Defendants CITY OF SANTA ANA, ROBERT RICHARD and DAVID REAM the sum of $10,000.00 in compensatory damages, plus post-judgment interest on said sum as authorized by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff BARBARA LAMBERT shall have judgment against and recover from Defendant ROBERT RICHARD the further sum of $20,000.00 in punitive damages, plus post-judgment interest on said sum as authorized by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court's orders dated November 23, 1992 and July 26, 1993 shall be merged into and become a part of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs SANTA ANA CITY EMPLOYEES ASSOCIATION and BARBARA LAMBERT shall recover from Defendants CITY OF SANTA ANA, ROBERT RICHARD AND DAVID REAM their costs of suit.

DATED: _____

_____
JUDGE OF THE UNITED STATES
DISTRICT COURT

APPROVED AS TO FORM:

/s/ ROBERT J. WHEELER
ROBERT J. WHEELER, Esq.
Attorney for Defendants
City of Santa Ana,
Robert Richard and David Ream

CONSTITUTIONAL PROVISIONS

Amendment 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 14
Section 1. Citizens of the United States

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

42 USCS § 1983 Civil Rights

§ 1983. Civil action for deprivation of rights

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

(R.S., § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP

So wrote the eminent management consultant and distinguished scholar Peter Drucker in his book *The Practice of Management.*

If Drucker's prescept rings true, and we believe that its truth is self-evident, it is the essence of our indictment of Rob Richard, and concomitantly, of our plea to the City Council. During Richard's tenure, and thanks to his directorship, the spirit of the Library staff has declined dramatically. Under his direction, under his management, the Santa Ana Public Library still functions, but just barely. We staffers continue to perform, to do our jobs, but devoid of zest, with leaden hearts and wooden hands.

If only because it is an intangible thing, the spirit of an organization is hard to contour and to measure. It's an even more difficult thing to pin down, let alone to document. So it is by a remarkable piece of good fortune that the members of the City Council can actually "get a handle on" the subject demoralization of the Library staff.

For sometime back the former Deputy City Manager, Jan Perkins, commissioned Swadesh Chopra to do an independent study of the Library staff members attitudes toward, and opinions of Richard. Ms. Chopra's study was, we believe, in large measure completed when suddenly it was discontinued. The results were never disclosed. We believe the survey was suppressed, and we believe we know why. We believe that when her findings were about to emerge, the administration determined to conceal them, to cover them up.

We urge you as Council Members to insist that the administration now reveal both to you and to us what Ms. Chopra's findings were.

Meanwhile let's surmise. Indeed, we believe we know what the substance of her findings was, and, that it was twofold. We think that she found, first, that both the numerically overwhelming and the thematically dominant response to her inquiries was apprehension, F E A R ! Richard seeks *systematically* to intimidate his subordinates: "I can always write you out of the budget." "I will have my retribution." It's no wonder that virtually all of us were and are afraid of him.

And we think she found, second, that hardly anyone on the Library staff either trusted or respected him. They neither trust him as a person nor respect him as a manager. The only respect he commands is that of command; it is leadership by intimidation.

There is no single overt act, no dramatic "smoking gun" by means of which Richard might stand exposed. His wrongful conduct is more insidious than that. Smoke is visible; the fumes with which our atmosphere is laden are less visible than smoke, but far more toxic.

It requires courage, immense courage, to speak out against, our library director, but we feel immediate action is [absolutely] necessary.

MEMORANDUM [SANTA ANA]
[CITY SEAL]

To: Barbara Lambert Date: November 2, 1990
From: Library Director
Subject: Written Reprimand

This is a written reprimand given to you for insubordinate actions taken by you at an evening session of the City Council and for not utilizing the established procedures for a grievance. The details are as follows:

> At the City council evening session on Monday, October 15, 1990, you came and spoke before the Santa Ana City Council. Without any facts to support you remarks, you made comments to the Council such as ". . . our indictment of Rob Richard . . ." and "His wrongful conduct is more insidious . . ." These statements constitute insubordinate behavior toward the Director of the Santa Ana Public Library.

The proper process for filing a grievance can be found in Article XVII, pages 25 and 26 of the Memorandum of Understanding between the City of Santa Ana City Employees' Association/Service Employees International Union Local 1939. A copy of the section is attached.

This written reprimand will be placed within your personnel file.

Rob Richard
sl
cc: Jan Ignasiak, Library Department
Personnel Services Department

Acknowledgement of receipt:

_____
Barbara Lambert

Supreme Court, U.S.
FILED
NOV 9 1995
CLERK

No. 95-577

(2)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

**CITY OF SANTA ANA,
DAVID REAM AND ROBERT RICHARD,**
Petitioners,

V.

BARBARA LAMBERT, et al.,
Respondents.

**Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTIONS PRESENTED

Respondents believe that the only question raised by the petition can be more correctly stated as follows:

Did the Ninth Circuit Court of Appeals correctly hold that a speech by a union official is on a matter of public concern warranting First Amendment protection, where it was made in a public televised session of a city council meeting about mismanagement of a city department which was adversely affecting employee morale and service to the public?

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No. 95-577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CITY OF SANTA ANA,
DAVID REAM AND ROBERT RICHARD,

Petitioners,

vs.

BARBARA LAMBERT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Santa Ana City Employees Association and Barbara Lambert respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the City of Santa Ana, David Ream and Robert Richard.

STATEMENT OF THE CASE

Petitioners have failed to set forth "the facts material to the consideration of the questions presented." Supreme Court Rule 14.1(g). The following is a summary of the Findings of Facts of U.S. District Court Judge Robert Takasugi (Petition, Appendix B), which were undisputed by petitioners in their appeal to the Ninth Circuit:

Santa Ana City Employees Association ("SACEA") is the exclusive bargaining representative for all non-supervisory, non-professional employees of the petitioner City of Santa Ana (the "City"), including all non-supervisory library employees; Barbara Lambert ("Lambert") is a library employee of the City since 1966 and a director of SACEA. Robert Richard ("Richard") is the Library Director of the City; David Ream ("Ream") is the City Manager.

Prior to October 15, 1990, the tension between the staff of the City library and defendant Richard became the subject of public discussion. SACEA and its library members had protested to City management regarding Richard's conduct. The protests included assertions that

Richard mismanaged the library department and treated employees in an abusive and intimidating manner, and that Richard's conduct was having an adverse effect on service to the public.[1]

On October 1, 1990, SACEA President Eddie Bentley ("Bentley") spoke at a public meeting of the Santa Ana City Council. After reporting to the Council that there was a lack of communication between library staff and the Library Director and a lack of confidence in him, Bentley requested that the Council direct the City Manager to investigate the circumstances causing library staff members to work in fear of their jobs. Mayor Young requested the City Manager to investigate and provide a status report to the Council within two weeks.

On October 15, 1990, pursuant to a request from Bentley, Lambert addressed the Council at a public meeting during the public comments period. The proceedings were televised via cable to approximately 20,000 dwelling units in the City. In her remarks, Lambert communicated to the Council her belief and the belief of many of her fellow workers that Library Director Richard was mismanaging the City's libraries and that his conduct was causing great damage to the public, the library, and the library's employees.

On or about November 2, 1990, defendant Richard issued to Lambert a letter of reprimand "for insubordinate action taken by you at an evening session of the City

---

[1] The evidence in support of this Finding included newspaper articles in the Los Angeles Times and The Register, the two largest daily newspapers in the area, which dealt with the problems in the library department and the employee protests.

Council and for not utilizing established procedures for a grievance." The reprimand accuses Lambert of making insubordinate statements when she criticized Richard in her remarks to the City Council and stated that the letter will be placed in Lambert's personnel file. SACEA, though counsel, protested the letter of reprimand by a letter to City Manager Ream, dated November 12, 1990. SACEA demanded that the letter of reprimand be withdrawn and that Richard by disciplined for violating Lambert's constitutional and statutory rights to speak, petition, and engage in union activity. The letter of reprimand was not rescinded.

SUMMARY OF ARGUMENT

Nowhere in the petition's repetitive incantations about the personal non-public nature of the speech in question does it state: (1) that prior to the speech, "the tension between the staff of the City library and defendant Richard became a matter of public discussion," (2) that two weeks prior to Lambert's speech, her union president had addressed the City Council about the library's problems, and had requested that the Council direct the City Manager to investigate the matter, (3) that the Mayor in fact requested the City Manager to investigate and report to the Council in two weeks, and (4) that Lambert, a union director, spoke to the Council two weeks later at the request of her union president, in a public meeting which was televised to approximately 20,000 cable subscribers in the City. (Petition, Appendix B, pp. 4-5). Petitioners' persistence in treating a dispute which was the subject of widespread press coverage and public debate as a "personal internal agency matter" is inexplicable. Whatever the reason for their refusal to accept the rulings of the lower courts, it should be evident that the

uncontested facts are alone sufficient to deny the petition. Moreover, the petition fails to demonstrate that the decision of the Ninth Circuit is in conflict with the decisions of this Court or those of other circuits, or that it raises an issue of law, the resolution of which is important to the public.

REASONS FOR DENYING THE WRIT

A. The Decision of the Ninth Circuit Does Not Conflict With The Decisions Of This Court Or Those Of Other Circuits.

1. Alleged Conflict with Waters v. Churchill.

Petitioners contend that "the Ninth Circuit basically ignored [Waters v. Churchill, ___ U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994)]. . . ." In fact, in footnote 2 to its opinion, the Court of Appeals expressly rejected petitioners' argument. [Appendix A6.] The Ninth Circuit was correct in its conclusion that while the reprimand mentioned specific examples, Lambert was disciplined for her entire statement. More importantly, Waters has no relevance to this case because there is no dispute here about the speech for which discipline was imposed.

Petitioners rely on the following passage from Waters:

> "So long as Davis and Waters discharged Churchill only for part of the speech that was either not upon an issue of public concern . . . it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and non-

> disruptive. An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements."

In relying on this passage, [Petition, at 5], petitioners ignore the phrase, "unbeknownst to them." The issue before the Court in Waters was whether government employers could be held liable for punishing speech which was "unbeknownst to them." Justice O'Connor's opinion, which announced the judgment of the Court, and was joined by the Chief Justice and Justices Souter and Ginsberg, declares, at 114 S.Ct. 1882:

> "In this case, we decide whether the Connick test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said." [2]

In this case, the speech was made in an open televised session of the City Council; thus, there was no need to apply Waters because there is no dichotomy between what the employer "thought was said," and "what the trier of fact ultimately determines to have been said." Id. at 1882. Therefore, the decision of the Ninth Circuit is not in conflict with Waters.

---

[2] Justice Souter, who joined the opinion of Justice O'Connor, emphasized that the Court's holding was that "a public employer who reasonably believes a third party report that an employee engaged in unprotected speech may punish the employee . . ., even if it turns out that the employee's actual remarks were constitutionally protected." Id. at 1891.

2. Alleged Conflicts With Decisions of Other Circuits.

Petitioners contend that the decision of the Ninth Circuit is in conflict with other circuits on the issue of what constitutes speech on a matter of public concern. In so arguing, petitioners mischaracterize the lower court's opinion in this case and grossly distort the holdings of the cases cited from other circuits.

Petitioners repeatedly characterize Lambert's speech as being a personal attack and an internal agency matter. When the mayor of a city directs the city manager to investigate the charges brought by the city employees' union that a city department is run by fear and intimidation, and that morale in the department is so low that it is adversely affecting public service, there can be no question about whether the subject is a matter of public concern. Thus, the predicate for petitioners' argument regarding conflicts with other circuits disappears when one considers that the Ninth Circuit correctly applied this Court's precedents in determining that the speech involved a matter of public concern.

Nor do the cases cited by petitioners establish a conflict. Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986), involved a teacher's aide who was allegedly punished for a private statement to a school board member about the lack of materials in her classroom. The Fourth Circuit correctly stated that the mere fact the statement was to a school board member does not cloak it with constitutional protection, but nothing in Daniels even remotely conflicts with the Ninth Circuit's treatment of Lambert's union speech in a public city council meeting about a matter that was the subject of an investigation by the City Manager at

the direction of the Mayor.

The Seventh Circuit cases cited by petitioners are even more inapposite. Linhart v. Glatfelter, 771 F.2d 1004 (7th Cir. 1985), also dealt with private speech. The court stated that the test of whether the speech involves a matter of public concern "requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern? Or was the point to further some merely private interest?" 771 F.2d at 1010. The Ninth Circuit applied the same test here: it was clearly the point of both Lambert and the SACEA, of which Lambert was an elected officer, to bring to light through public city council meetings the wrongdoing of the Library Director in using intimidation and fear tactics to the detriment of employees and the public they serve.

Petitioners' reference to Phares v. Gustafson, 856 F.2d 1003 (7th Cir. 1988), is absurd. That case dealt with a claim that First Amendment protection should be afforded to statements by a clerical employee about how veterinarians were filling out forms. The Court said, at 1007:

> "It is difficult to understand how a dispute between clinicians and a staff member of the medical records unit concerning the proper method of abstracting the medical records would be a matter of concern to the general public."

It is even more difficult to understand the logic of petitioners' reliance on Phares, Linhart, and Dunn on appeal to this Court about whether a public speech to a

city council by a union officer is protected by the First Amendment.

Petitioners' attempt to characterize Lambert's speech as a personal attack on Richard leads them to cite Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992), as another case which supposedly conflicts with the Ninth Circuit. Colburn found that the point of the speech in question was to address how faculty infighting would affect the personal careers of the speakers; there was no public purpose to the speech. Id. at 587. Not only does Colburn offer no support for petitioners' "conflict" argument, that case recognizes that speech which is related to collective activity may be on a matter of public concern. Id. 586.

B. The Decision of the Ninth Circuit Does Not Rest on Any Novel Principles of Law Which Warrant the Granting of a Petition for Certiorari.

Petitioners have failed to cite any issue of law, the resolution of which is of importance to the public, as distinguished from petitioners. Indeed, the issues posed in the statement of questions presented demonstrate that petitioners are merely challenging the conclusions of the Ninth Circuit which are limited to the particular facts of this case.

The petition's questions 3 and 4 are predicated on erroneous characterizations of the speech which is at issue. In posing each question, petitioners state that the speech was on "the internal workings of a government agency." Nothing in the undisputed Findings of Facts supports this oft-repeated assertion. The Ninth Circuit correctly stated that "There is no question that Richard's management

style had become an issue of significant public concern by the time Lambert spoke to the council," citing Finding of Fact No. 5, supra, at p.2. In rejecting petitioners' claims for qualified immunity, the court stated:

> "In light of the prior public criticism and the city manger's investigation of Richard, and the fact that Lambert appeared before the city council as a union official, any reasonable official quickly would have recognized Lambert's speech as one addressed to a matter of public concern. The actions taken by Ream were retaliatory, not reasonable."

Nothing in the Ninth Circuit's decision can reasonably be characterized as raising an issue of law which is significant to the public. Indeed, on the undisputed facts of this case, the Court of Appeals correctly stated that "any reasonable official would have quickly recognized Lambert's speech as one addressed to a matter of public concern."

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: November 2, 1995

Respectfully submitted.

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